

sagging tissues and wrinkles * * * Slim-O is the newest, easiest way to lose excess fat and maintain a beautiful figure—always."

DISPOSITION: November 9, 1949. Default decree of condemnation and destruction.

2985. Misbranding of mineral oil. U. S. v. 108 Bottles * * *. (F. D. C. No. 27682. Sample No. 55206-K.)

LIBEL FILED: On or about August 9, 1949, District of Kansas.

ALLEGED SHIPMENT: On or about November 5, 1948, by Rozelle, Inc., from St. Louis, Mo.

PRODUCT: 108 1-pint bottles of *mineral oil* at Hutchinson, Kans.

LABEL, IN PART: "Imperial Brand Mineral Oil."

NATURE OF CHARGE: Misbranding, Section 502 (a), the label statement "A satisfactory internal lubricant for * * * nursing or expectant mothers" was false and misleading since the article was not a safe drug for use by nursing or expectant mothers.

DISPOSITION: September 30, 1949. Default decree of condemnation and destruction.

2986. Misbranding of Doctor's Prescription Rx 7-11. U. S. v. 136 Bottles, etc. (F. D. C. No. 27461. Sample Nos. 55260-K, 55549-K.)

LIBEL FILED: On or about July 20, 1949, Western District of Missouri.

ALLEGED SHIPMENT: On or about June 6, 1949, by the Murrell Laboratories, from Norman, Okla.

PRODUCT: 136 bottles of *Doctor's Prescription Rx 7-11* at Kansas City, Mo., together with a number of leaflets entitled "say goodbye to all scalp disorders." Examination showed that the product consisted essentially of water, alcohol, and glycerin, and small proportions of sulfanilamide and sulfathiazole, and red coloring matter.

NATURE OF CHARGE: Misbranding, Section 502 (a), the following statements in the leaflets were false and misleading since the article was not effective in the treatment of the conditions stated and implied: "say goodbye to all scalp disorders * * * a scalp treatment * * * Relieves your scalp of * * * Dermatitis and Seborrheic * * * rid your scalp of Scales."

DISPOSITION: December 6, 1949. Default decree of destruction.

2987. Misbranding of Radiant Ozone Generators. U. S. v. 1 Device * * * (and 6 other seizure actions). Tried to the court and jury. Verdict for the Government. Decree of condemnation. (F. D. C. Nos. 25779, 27358 to 27362, incl., 27829. Sample Nos. 21777-K, 29277-K to 29280-K, incl., 29780-K, 49801-K, 49802-K.)

LIBELS FILED: September 29, 1948, and July 18 and September 12, 1949, District of Colorado and Western District of Oklahoma.

ALLEGED SHIPMENT: Between the approximate dates of May 25, 1948, and April 23, 1949, by J. C. Gage and the Ozone Clinic, from Kansas City, Mo.

PRODUCT: 12 *Radiant Ozone Generators* at Oklahoma City, Okla., and Lamar and Denver, Colo., together with a number of leaflets and circulars entitled "The Radiant Ozone Generator," "A Few Suggestions," and "How to Use the Radiant Ozone Generator For the Best Results at Home," and a number of pages of testimonials. Examination showed that the device consisted of a

wooden cabinet, with neon-type tubes on top which were connected with a transformer in the cabinet. When plugged into an ordinary household electric current, the primary leads of the transformer activated the gas in the tubes, one type of which gave off a blue, and the other a red, hue. When the device was in operation, it produced ozone.

NATURE OF CHARGE: Misbranding, Section 502 (a) certain statements in the accompanying leaflets and testimonials were false and misleading since the device was not effective in the treatment of the symptoms, conditions, or diseases stated, nor for the purposes mentioned. The statements represented and suggested that the device would produce ozone, rays, color, and vibration, which were claimed to be the four essential things for health and would thereby relieve suffering from different incurable diseases; that the device would destroy all germs and bacteria, deodorize and purify the air, purify the blood, and rejuvenate the entire body; that it would be effective in the treatment of arthritis, asthma, anemia, cancer, diabetes, sinus affections, pneumonia, rheumatism, piles, varicose veins, neuritis, colds, tonsillitis, sore throat, headache, stomach ache, earache, toothache, indigestion, fever, and la grippe; that it would ozonize the body and assist one in getting the best results for various diseases; that it would revitalize the body; that it would be effective in the treatment of angina, diphtheria, mumps, whooping cough, bladder and kidney troubles, blood disorders, eye trouble, catarrh, heart trouble, hay fever, sinus trouble, liver trouble, prostate gland trouble, colitis, constipation, pneumonia fever, paralysis, ulcers, sores, sprains, varicose veins, tuberculosis, and mastoid ear; that it would be effective in the treatment of throat troubles, chicken pox, serious colds, cancer of the breast, inflammation of the kidneys, neuritis, neuralgia, disease caused by impure blood, ailments caused by poor circulation, stomach trouble, enlarged heart, cataract, bronchial asthma, appendicitis, chronic constipation, weakened run-down condition, sciatic rheumatism, and partial paralysis; and that it would be effective in aborting pneumonia and flu, maintaining and restoring health and strength, cleansing the blood, scattering blood clots, and killing germs that are in the blood.

DISPOSITION: J. C. Gage appeared as claimant for the device, which was seized at Oklahoma City. Pursuant to a stipulation between the claimant and the United States Attorney for the Western District of Oklahoma, the libel action in that district was transferred to the District of Kansas on November 22, 1948. On December 13, 1948, the action was transferred from the District of Kansas to the Western District of Missouri pursuant to a stipulation between the Government and the claimant. Thereafter, the claimant filed a motion to dismiss the libel proceedings, and on January 10, 1949, such motion was overruled. An answer then was filed by the claimant, denying that the device was misbranded. Thereafter, the Colorado libel actions, upon application by the claimant and with the consent of the Government, were ordered transferred to the Western District of Missouri and consolidated for trial with the action then pending in that district. The matter came on for trial before the court and jury on November 14, 1949, and at the conclusion of the testimony on November 18, 1949, the court gave the following charge to the jury:

DUNCAN, *District Judge*: "Ladies and gentlemen of the jury, you have now heard all of the testimony in this case and the arguments of counsel, and it now becomes the duty of the Court to charge you as to the law. I am not sure whether all of the members of this panel have been on juries in this court, or some other division of the court, since you have been serving on it. Some of you have been on juries in this court I know and some of the things

the Court may say to you will be repetition, if you have served before, but it is the duty of the Court in every case to charge the jury as to the law.

"Now, in the United States courts the Court has the duty of charging the jury as to the law and the Court also has a right to advise the jury as to the facts. That is not true in our state courts. So that we may not confuse our practice, in the state courts the court's instructions are written instructions which may be taken to the jury room by the jury. They are made before the arguments of counsel and the court cannot comment, as we say, upon the evidence, but in the federal court the instructions of the court are oral, although in cases where the law may be complicated, the Court's instructions may be written, but for all practical purposes they are oral and you cannot take those instructions in any written form to your jury room. It is, therefore, essential that you pay as close attention as you can to the Court's charge because in your deliberations upon the case it will be necessary for you to remember and carry with you in your mind the law as to the case.

"I think the law in this case is not complicated. Under our form of practice in this country where we have the jury system, the sole responsibility of determining what the facts are is for the jury. It is the Court's duty, as I said, to charge you as to the law. Now, you may not agree with what the law is as the Court gives it to you. The Court might even be mistaken as to what the law is, but as the Court gives you the law, it is as the Court believes it to have been construed and to have been written by the Congress, by the legislative branch of our government, and as it has been construed by the courts whose duty it is to construe the law. There are times when the judge who charges a jury as to the law may not in his own mind, in his own way of legal thinking, agree that the law ought to be as it is, but the Court does not write the law. Neither does the jury write the law. You and I must take it as it is given to us by the legislative branch of our government and by the courts who construe it. So, when you have determined what the facts are, you will apply the law to those facts, or the facts to the law. Those findings by you are binding upon this Court. They are binding upon this Court and any other court to which the case might go. If either party losing the case should be dissatisfied with the result of it, they have the right to an appeal and another court will pass upon it, but only on questions of law in determining whether or not the Court has erred in the admission of testimony or in its construction of the law and the charge to the jury. If there is any basis in fact or in law for the finding that you have made as to the facts, then it is binding upon this Court and any other court. So yours is the greater responsibility.

"Of course, we should approach this case, as every other case, without sympathy for anybody or prejudice against anybody. You and I in our duty under the oath that we have taken—I to uphold the Constitution and the laws of the United States, and you to try the issues joined as they come to you, determine the facts as they come to you from the witness stand—should not be actuated by any motives of prejudice, by any motives of sympathy. It should not make any difference to you and to me whether everybody in Kansas City or everybody in Missouri is interested in this case on one side or the other, in a determination of what those facts are. It makes no difference that the Government is on one side of this case and the device which is in evidence is on the other. We are not concerned about that and no person, regardless of who or where, has any right to question your verdict when you leave this courtroom, and if any person should question your verdict when you leave this courtroom, it would be your duty in the maintenance of the honor and dignity of the Court to report that fact back to the Court and that person would then be liable to be brought into court and charged with contempt of court. So, when you leave this courtroom no person any place has a right to question you or a right to question your motives in anything you may do. They may disagree with me as to the law that I give. They might disagree with you as to the findings of fact, but they have no right to bring you, or attempt to bring you to accountability for any finding that you may make.

"This is not the usual case. I don't mean the facts, but I mean the nature of the case. It is what we term a "libel" proceeding. It is an offshoot of the old admiralty law in which, if any ship commits a wrong, com-

mits damage, then the suit is brought not against the owner, but against the ship itself, whatever the name of the ship may be. So, this is an offshoot of that, what we call a "libel proceeding." This suit is not brought against Mr. Gage; it is brought against this machine, this device for the purpose, if the Government is successful, of taking possession of it and then the Court will determine what is to be done with it.

"It is an inanimate thing; it is against the *res*, the thing itself and after the initiatory proceedings have been made, then the owner, the claimant of the machine comes in and files a claim to take the machine back and that person is known as the claimant. That is Mr. Gage in this case. When it was taken from those who had it, under the authority of the Court, under a writ alleging certain things that have been alleged here, then Mr. Gage came into Court and filed a claim for it. So, he is now called the "claimant" and if your finding be for the claimant, then the machines will be turned back. If it isn't, then they will remain in the custody of the Government until they are otherwise disposed of.

"There isn't any question about the jurisdiction of this Court. The Government of the United States had a right, under the Pure Food and Drug Act, to do what it did. Now, we have a dual form of government. The states and the federal government are each sovereign within their own rights and within their own jurisdiction. The federal government has no authority except that which has been specifically delegated to it by the people and such authority as has not been delegated to it remains within the states under their own laws and under their own constitution. So the federal government obtains jurisdiction over matters of this kind purely because of the interstate features of it, that is, when an article in commerce is transferred from one state to another, it is moving in interstate commerce and under the Constitution the federal government has a right to legislate with respect to matters moving in commerce, but not with respect to matters that are wholly within the state. That jurisdiction and authority over them is vested in the state and in the legislature under the authorities of the states, so that in this case the only way the government gets jurisdiction is because these devices—and it is admitted, there is no dispute about that, the claimant admits it—these devices or machines were sold and shipped in interstate commerce and that the advertising and pamphlets about which the government complains moved with the machine or were a part of it. The advertising and pamphlets or letters, or whatever it may be, do not necessarily have to accompany the machine as it is moved from one state to another. If it is a part of the transaction, then under the law it comes within the definition of interstate commerce and accompanies the machine. The Supreme Court of the United States has passed upon that question. So there is no question of that kind involved in this case and there is no proceeding here directly against Mr. Gage.

"You are instructed that under the Federal Food, Drug and Cosmetic Act the shipment in interstate commerce of any device that is misbranded is subject to seizure and condemnation. You are not concerned yourselves with the interstate commerce question as the claimant has admitted he shipped all of the devices and labeling involved in this trial in interstate commerce.

"You are not concerned with any of the machines that belong to any persons. This is not a proceeding to prevent the making of this machine or to prevent the sale of it. This is a proceeding solely to determine whether or not the label, that is the things that have been read to you here, the advertising, the testimonials that have accompanied these machines, are false or misleading in any particular. Now, that is the sole and only question that you are concerned with here, and in that connection you are instructed that the Food, Drug and Cosmetic Act provides that a device shall be deemed to be misbranded if its labeling is false or misleading in any particular.

"The term 'device' is defined in the Federal Food, Drug and Cosmetic Act and as it applies to the issues in this case means 'instruments, apparatus and contrivances intended (1) for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man.' You are instructed that each of the devices referred to in the 7 libels filed herein is a device within the meaning of the Federal Food, Drug and Cosmetic Act.

"The Federal Food, Drug and Cosmetic Act defines 'labeling' to mean, 'All labels and other written, printed or graphic matter (1) upon any article or

any of its containers or wrappers, or (2) accompanying such article,' and I have explained to you that 'accompanying' does not necessarily mean that it is in the box or must be attached to it. It means that it is a part of it and travels to and gets from one state to another to the person who has purchased or acquired the machine, or been sent rather by the maker of the machine.

"You are instructed that Government's Exhibits 2 and 3 constitute 'labeling' in this case and apply in each of the 7 cases on trial.

"Now, I assume, gentlemen, that those exhibits will be made available for the jury to take to the jury room and I am going to rely upon that assumption, so I am not going to take the time to go over all of this evidence because you remember the evidence as well as I do.

"In that connection I think the Court should call your attention to the fact, and without comment, that as a part of the labeling it is stated that 'the Radiant Ozone Generator has been tried with great success on the following diseases: arthritis, asthma, anemia, cancer, diabetes, sinus, pneumonia, rheumatism, piles, varicose veins, neuritis and colds. According to good authority there are more people suffering from arthritis than from heart disease, cancer and tuberculosis. What causes this disease, we believe we have found the answer to that question. We also believe the future will have many surprises for us as far as the health giving qualities of Ozone are concerned. It is our firm conviction that the surface has not even been scratched yet in the application of the use of Ozone, color, rays and vibration in the treatment and destruction of microbic diseases in human beings. Ozone will some day change our present practice of medicine and surgery because of its powerful influence on bacteria. In cases where the patients were able to inhale at all, they were at once relieved and successfully carried over the crisis.'

"Referring to influenza, and there are many others that you will have before you in determining whether or not the labeling is false, you are instructed that as used in the Federal Food, Drug and Cosmetic Act, the word 'false' applies to 'any representation or suggestion which is inaccurate, incorrect, untrue or an erroneous statement of fact.' You are instructed that the word 'misleading,' as used in the Act, applies to 'any written, printed, or graphic matter which misleads or deceives or has a tendency to lead into error, to lead astray or to lead into the wrong path.' You are further instructed that deception may result from the use of statements not technically false or which may be literally true. The aim of the Act is as much to prevent deception which may result from indirection and ambiguity, as well as from statements or misrepresentations which are false.

"You are further instructed that it is not difficult to choose statements, representations, pictures, symbols or slogans which will not deceive and those which are ambiguous and liable to deceive should be read favorably to the accomplishment of the purpose of the Act, namely, the avoidance of fraud and deception upon the purchasing public. Statements that are ambiguous and liable to mislead, or which create or lead to false impressions in the mind of the reader, are misleading within the meaning of the law. In determining whether the labeling involved is false or misleading for any of the reasons claimed, you will consider whether the statements complained of are likely to create a false or misleading impression in the mind of any person who reads such statements pertaining to the claims made for the devices involved in this case.

"In determining whether any statement in the labeling, as previously explained to you, is false or misleading in any particular, and in determining whether any such statement represents or suggests that the article of device when used according to directions is effective in the cure, mitigation, treatment or prevention of any condition or disease, you are instructed that the words, 'statement' or 'graphic materials' used in such labeling should be given their ordinary meaning, that is, the meaning that would be attributed to them by the ordinary person to whom they are addressed. If you believe from the credible evidence that an ordinary person after reading any of the statements complained of in said labeling would ordinarily be led to believe that a particular condition or disease would be cured, mitigated or prevented by the recommended use of the machine, or that the machine when so used would be a competent treatment for such disease or condition, and if you further believe from the credible evidence that the machine when used as directed would

either not cure, mitigate, or prevent, or be a competent treatment for such condition or disease, then the device is misbranded and the shipments thereof in interstate commerce constitute violations of the Federal Food, Drug and Cosmetic Act.

"And may I pause here to say that the duty is upon the government to prove the case, that is, the misleading statements, by the preponderance or greater weight of the evidence. That does not necessarily mean the greater number of witnesses testifying, but such evidence as is more satisfying and convincing to the jury.

"The Government is not required to prove that the devices involved are dangerous to health or harmful in any way. The Government is only required to prove the presence of a false or misleading statement in the labeling.

"The label on the device in evidence indicates that the device is registered in the United States Patent Office. Now, this matter came up yesterday and the Court made a ruling on it. Neither this label nor the fact that there has been compliance with the laws involving patents, gives the claimant, J. C. Gage, the right to disseminate any false or misleading statement on the labels or in the labeling of these devices. In reaching your verdict you will completely disregard all reference to patents. That question has absolutely nothing to do with whether or not the machine does or does not do the things which are claimed for it, or which are charged to it.

"During the course of the trial references have been made to affidavits and testimonials; printed matter containing testimonials and matter in the nature of testimonials appear in some of the exhibits. I must give you a word of caution about them. In your deliberations they are not to be considered by you as proof of the effect of the use of this device in connection with the diseases or conditions mentioned therein. There was no evidence to show that the authors of the testimonials were qualified to diagnose diseases or conditions, nor that they were qualified to evaluate the results of the use of the Radiant Ozone Generator on certain types of those diseases. The Government has based allegations of misbranding on some of the testimonials that are in evidence and has properly introduced evidence for your consideration, to prove its allegations of false and misleading statements. The authors of the testimonials may have been deceived as to the nature of the diseases or conditions from which they suffered or as to the effect of the use of the device.

"I think I stated to the jury in the early part of this charge—if I did not do so I should and will now—that any comment which the Court may make upon any evidence in this case or any factual situation, it is not binding upon you. It is simply the opinion of the Court or the judge of the court, because you are the sole judges of the credibility of the witnesses and the value you will give to their testimony. It is just the opinion of the Court and is not to be considered by you in any factual matter as you would be required to follow the suggestions of the charge of the Court as to the law.

"Now, in this case many objections were made and sustained by the Court as to the labeling of certain diseases by the witnesses. It is the law that laymen who are not trained in medicine, diagnosis, cannot say that they have heart trouble or stomach trouble or say that they have cancer or something of that sort. Those are matters that are left to those who are trained in the science to determine. One may think he has a heart disorder. It may result from overeating or from gastritis or some other ailment of the human body. One may think they have a cancer and yet when it is analyzed microscopically it may be determined it is not cancer, and it is for that reason that the courts have not permitted the laymen to place the label upon their ailments. They may discuss and they may detail the nature of the ailment, the pains they have, the obvious effect upon them, and that sort of thing, but otherwise not, and that was the reason for the Court sustaining those objections.

"Now, certain evidence in this case has consisted in the testimony of scientists, including medical men. Some of these testified to their personal observations of the results of ozone when used on human patients, some on experimental animals and on bacteria. There was testimony pertaining to a scientific determination of the emissions which the device is capable of producing. The facts established by recognized scientific investigations conducted by fair-minded, well-qualified scientific experts are deserving of high standing.

"Ordinarily in the trial of cases witnesses are confined in their testimony to facts within their personal knowledge. They are not permitted to draw conclusions or express opinions. There is an exception to that rule, however, which is this: that when the points in issue are concerned with a particular subject matter with respect to which there are trained persons who have special education, training and experience in a particular field, such persons are known as 'experts' and because of their special education, training and experience, are permitted to express opinions. That is particularly true with respect to matters with which the public generally does not and cannot completely familiarize itself. There are certain things that you and I as laymen cannot know. We haven't the faculties for knowing, so in those cases expert testimony is accepted by the Court where those who are trained and have made experiments may give to the jury and to the Court the benefit of their experiences and of their investigations and research.

"You are required, of course, to weigh and evaluate the testimony of an expert witness precisely as you weigh and evaluate the testimony of any non-expert witness. That is, you will consider the probability and reasonableness of the things to which the expert has testified, his interest in the outcome of the case, his education, training and experience, his standing in the profession, or want of it, and the breadth of his experience in the subject matter which would enable him to arrive at a correct conclusion. In this regard you should ask yourself: Is this witness, as a matter of fact, an expert qualified by scientific education, training and experience to acquaint himself with the scientific facts?

"You are the sole judges of the credibility of the witnesses and of the weight and value you will give to a witness' testimony. In determining the weight and value to be given to the testimony of any witness, you may take into consideration the attitude and demeanor of the witness on the stand; the willingness or unwillingness, as shown by the evidence of the witness, to speak truthfully with respect to matters within the knowledge of such witness; the opportunity the witness had to know and to be informed with respect to the matters about which such witness gives testimony; the interest of the witness, if any, in the result of the trial, as shown by the evidence; the reasonableness or unreasonableness, in your opinion, of the witness' testimony; the feeling on the part of the witness for or against either party as shown by the evidence, and any other fact or circumstance which you may consider important in weighing the witness' testimony. If you conclude that any witness has wilfully sworn falsely to any material fact, you are at liberty to disregard the whole or any part of such witness' testimony. I do not make that statement to you, ladies and gentlemen of the jury, as indicating any state of mind on the part of the Court as to whether a witness has testified falsely or otherwise. It is simply a guide that may be used by you in weighing the testimony and the evidence when you have gone to your jury room.

"The intent with which J. C. Gage, the claimant, acted in making the shipments is not a question for your consideration in this case. The government is not required to prove a wrongful intent or an awareness of wrongdoing. It is not necessary for you to find that J. C. Gage intended to make false or misleading statements in the labeling. The question of whether Mr. Gage acted in good faith is not material in this case. It is sufficient for a finding for the Government that the statements complained of, or any one of them, be false or misleading regardless of whether Mr. Gage was aware that any one of the statements was false or misleading. The persuasive effect of a false or misleading statement in labeling on the reader's mind is the same whether the representations were made in good faith or not. It is the responsibility of the person who uses the channels of interstate commerce for the distribution of devices to be assured that the labeling of the devices contain no false or misleading statement or representation. The statute places the burden of acting, at their own risk, upon persons who ship devices. It does not place the risk of use of devices upon the public, who are largely helpless in this regard.

"You are instructed that the devices here involved were misbranded if you are satisfied that the government has proved by a fair preponderance of the credible evidence that any single statement made in the labeling, Government's Exhibits 2 and 3, regarding the effect of the devices when used according to directions in the cure, mitigation, treatment, or prevention of any of the

diseases, disorders, conditions, or symptoms enumerated in the various labels was either false or misleading. In this regard it is not necessary for you to find that every statement complained of by the government is false or misleading, but if the government has sustained its contention in regard to any one of them, then it would be your duty to render a verdict in its favor.

"On the contrary, you are instructed that the issue in this case is whether the representations as set forth in the printed circulars delivered to the purchasers of the Ozone generator are false and misleading in any particular, and if the jury finds that said circulars are not false and misleading in any particular, then the jury should find for the claimant.

"This case does not involve a fine or penalty of any kind against the claimant. In the event there is a verdict favorable to the government in this case the devices are forfeited to the government and the law imposes the duty upon the Court of disposing of the devices and labeling involved. You are not to concern yourselves with that. The function of the jury is to weigh all of the evidence and determine whether you should render a verdict for the claimant or the government.

"It requires twelve of your number agreeing to return a verdict. When you have gone to your jury room, you will elect, of course, a foreman from among your number and when you have arrived at a verdict, your verdict will be signed by the foreman.

"This case has taken, ladies and gentlemen, approximately four days to try. Every possible effort should be made by the jury to arrive at a verdict. All of the evidence has been submitted apparently that can be submitted. Each side is represented by able and distinguished counsel. The case has been tried well and it is not likely that it could ever be tried any better. The jury to which it is being tried is drawn from the same source and in the same manner that any other jury would have to be drawn that might in the future be called upon to try this case, or any case like it. No juror should sacrifice his or her own convictions or do that which they believe, under their oath, should not be done, but, on the contrary, they should be respectful of each other's opinion and listen with the idea of conviction and make every effort consistent with your oath and your own conscience to finally arrive at a verdict.

"There have been prepared for your consideration seven verdicts. They will be handed to the bailiff when you retire and be delivered to you in your jury room. There are 7 cases that are being tried here, as was told you in the beginning. They are identical, so there should be 7 verdicts to be signed by you, one in each case. The verdict reads, 'We, the jury in the above entitled case'—and I have clipped them together—'We, the jury in the above entitled case, find the issues in favor of the Government and against the Claimant,' and a place for the foreman to sign. If you find for the Claimant, the verdict will read, 'We, the jury in the above entitled case, find the issues in favor of the Claimant and against the Government,' to be signed by the foreman, so that there will be 7 verdicts and they are numbered so that there should be no confusion with respect to them.

"I believe I have covered the case. The jury will retire for just a little while—let's see, you don't want to go out now, I am sure. It will take you some time so I suggest you come back, ladies and gentlemen, after lunch. When do you want to come back, one o'clock or one-thirty, whatever time you want to come back."

"A JUROR. One o'clock."

"The COURT. Very well. Under the instructions heretofore given you, you will be excused until one o'clock and return to the jury box at that time."

(Whereupon, the jury being excused, the following further proceedings were had:)

"The COURT. Gentlemen, what exceptions do you have to take to the charge of the Court?"

"Mr. HARGUS. None, your Honor."

"The COURT. What about you, Mr. Prince?"

"Mr. PRINCE. Your Honor, we wish to except to one part of your charge and that is where you selected a class of the witnesses and commented upon their credibility."

"The COURT. That is with respect to the—"

"Mr. PRINCE. Experts."

"The COURT. Very well, the exception will be allowed. We will now adjourn until one o'clock."

(Whereupon, the Court stood at recess until one o'clock p. m.)

(And, thereafter, at one o'clock p. m., the jury retired to consider of its verdict, and at two-thirty o'clock p. m., returned to the court room for further instructions as follows:)

"The COURT. The jury has requested some clarification of some instructions that they are in doubt about and have asked to have them brought into the court room."

"Mr. CELL. Beg pardon?"

"The COURT. The jury wants some clarification of one of the instructions and I have asked them to be brought back."

"Mr. CELL. I don't see any objection to that."

"The COURT. Mr. Foreman, the bailiff informs me that there is some question—misunderstanding probably, concerning some instructions. Will you advise the Court?"

"The FOREMAN. Well, your Honor, a question has arisen, when you gave us the charge of the law as to one part, as to what we were to consider, and this part that has come up—we asked if we were to consider whether or not the machine helps to relieve, medicate in any way, or are we to rely upon the literature that accompanies the machine?"

"The COURT. You are to consider—let me see if I can find that instruction. I should like to give it to you as I gave it to you this morning. Here was the instruction I gave you this morning. You are instructed that the devices here involved were misbranded, if you are satisfied that the Government has proven by a fair preponderance of the credible evidence that any single statement made in the labeling, Government Exhibits 2 and 3, regarding the effect of the devices when used according to directions in the cure, mitigation, treatment or prevention of any of the diseases, disorders, conditions or symptoms enumerated in the various libels was either false or misleading. In this regard it is not necessary for you to find that every statement complained of by the Government is false or misleading, but if the Government has sustained its contention in regard to any one of them, then it would be your duty to render a verdict in its favor. In other words, if the jury finds that there is any misrepresentation with respect to any of the information with regard to this machine. Now, anything further that the Court can give you within the limits of the Court's authority I shall be glad to do so. If you find there is any misrepresentation with respect to any of the information that is before you, then it would be your duty to find for the plaintiff, the United States. Is there any misunderstanding in the mind of any person before you go back?"

"The FOREMAN. Thank you, your Honor."

"The COURT. You think that clears it up?"

"The FOREMAN. I think so."

"The COURT. Is there any exception to that?"

"Mr. CELL. I think not."

"The COURT (to the jury). Just stand outside until counsel has been given an opportunity to take exceptions."

(Whereupon, the jury retired and the following proceedings were had out of the presence and hearing of the jury:)

"Mr. HARGUS. There is none on the part of the Government."

"The COURT. Any exceptions, Mr. Cell?"

"Mr. CELL. I think not, your Honor."

"The COURT. Very well. I read the instructions exactly as it was read to them today. Very well, let them go."

(Whereupon, the jury retired to further consider of its verdict.)

(And thereafter, at 2:50 o'clock p. m., the jury returned into open court, and the following proceedings were had:)

"The COURT. [Reading:] We, the jury in the above entitled cause, find the issues therein in favor of the Government and against the Claimant.

—Howard R. Victor, Foreman."

"Is that the verdict of the jury, ladies and gentlemen, and each and every member of the jury?"

"The FOREMAN. Yes, sir."

"The COURT. In 5937, that is the same in each and every verdict of the seven cases. Do you gentlemen want me to read them all?"

"Mr. CELL. I don't think that is at all necessary."

"The COURT. Ladies and gentlemen, is that the verdict of the jury in each and every one of the cases in which you have returned verdicts, 5476, 5935, 5936, 5937, 5938 and 5939, is that the verdict in each and every one of those cases?"

"The FOREMAN. Yes, sir."

"The COURT. Thank you, ladies and gentlemen of the jury. Do you care to have the jury polled?"

"Mr. CELL. No, your Honor."

"The COURT. Record the verdict, Mr. Clerk, in the seven cases before the Court."

The jury returned a verdict in favor of the Government, and on November 29, 1949, judgment of condemnation was entered and the court ordered that the devices and the labeling be delivered to the Food and Drug Administration.

2988. Misbranding of Roll-A-Ray. U. S. v. 228 Cartons * * *. (F. D. C. No. 26076. Sample No. 8621-K.)

LIBEL FILED: November 18, 1948, Southern District of New York.

ALLEGED SHIPMENT: On or about February 11, 1948, by the O. A. Sutton Corp., from Wichita, Kans.

PRODUCT: 228 cartons each containing 12 *Roll-A-Ray* devices at New York, N. Y. Examination showed that the device consisted of a brown plastic molded case with handle attached. The case enclosed a light bulb and two rubber rollers placed at either end of the bottom part of the case. The rollers contacted the body for massaging purposes, and the light bulb furnished heat. A plastic grid was fitted over the bulb to protect the body from contact with the lamp.

LABEL, IN PART: "Roll-A-Ray Heat Massage With Infra Red."

NATURE OF CHARGE: Misbranding, Section 502 (a), the following label statements were false and misleading since heat and massage are not adequate treatments for the purposes represented: "For Home Reducing and an Aid in the Relief of Discomforts Arising from Rheumatism, Lumbago, Muscular Aches, Physical Aches * * * for Health and Beauty * * * to remove fatty tissues."

DISPOSITION: June 9, 1949. Elcord Products Corp., New York, N. Y., claimant, having consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the devices be released under bond, conditioned that each device be modified by removing the 60-watt bulb contained therein and replacing it with a 30-watt bulb; by placing a foil reflector on the inner portion of the device; by covering, removing, or destroying the labeling of directions and uses contained in the labeling of the device; and by using labeling approved by the Food and Drug Administration, so as to comply with the requirements of the law.

DRUGS FOR VETERINARY USE*

✓ **2989. Misbranding of Calfurdine. U. S. v. 2 Cans, etc. (F. D. C. No. 26384. Sample No. 28671-K.)**

LIBEL FILED: January 7, 1949, District of Utah.

ALLEGED SHIPMENT: On or about July 22 and August 5, 1947, by the Germ-O-Tone Laboratories, from Phoenix, Ariz.

*See also No. 2973.